in the Supreme Court of the United States

_____ TERM, 1976

No. 75-1804

JAMES ANTONIO and
GEORGE DEFEIS,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

LAWRENCE S. KATZ, ESQUIRE
One Lincoln Road Building
Suite 219
Miami Beach, Florida 33139
Attorney for Petitioner, Antonio

GEORGE D. GOLD, ESQUIRE and
MORAN AND GOLD, P.A.
Suite 608, Concord Building
66 West Flagler Street
Miami, Florida 33130
Attorney for Petitioner, Defeis

MIAMI REVIEW — 371-4853 — 377-3721

INDEX

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (cont.)

STATUTORY AUTHORITIES

OTHER AUTHORITY

in the

Supreme Court

of the

United States

_____ TERM, 1976

_____

NO. _____

_____

JAMES ANTONIO and
GEORGE DEFEIS,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

_____

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

_____

The Petitioners, JAMES ANTONIO and GEORGE DEFEIS, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on April 15, 1976. Petition for Rehearing was denied May 13, 1976.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 530 F.2d 14 (Appellate Number 75-3745, reported April 15, 1976) and is attached hereto as Appendix A. The Order denying Petition for Rehearing, dated May 13, 1976, is attached hereto as Appendix B.

JURISDICTION

The Judgment of the United States Court of Appeals for the Fifth Circuit was made and entered on April 15, 1976, and a copy thereof is appended to this Petition in Appendix A. The Order of the United States Court of Appeals for the Fifth Circuit denying a Petition for Rehearing was made and entered on May 13, 1976, and a copy thereof is appended to this Petition in Appendix B. Jurisdiction of this Court is invoked under Title 28, U. S. C., Section 1254 (1), and Rule 19, United States Supreme Court Rules. The Judgment of the United States Court of Appeals for the Fifth Circuit and the Order denying the Petition for Rehearing are (a) in conflict with the decision of another court of appeals on substantially the same matter; and (b) a decision on an important question of Federal constitutional law involving the right of an individual to remain free from unlawful and forceful entry into his home, which has not been, but should be ultimately settled by this Court. Therefore, the jurisdiction of this Court is invoked.

QUESTIONS PRESENTED

1. Where the record clearly establishes that entry into Petitioners apartment was accompanied by force, is the Appellate Court's determination that the entry was unaccompanied by any use of force whatsoever clearly erroneous.

2. Did the entry by force constitute a violation of Petitioners Fourth Amendment Rights to remain free from unreasonable searches and seizures.

3. Whether the presence of an undercover agent posing as a narcotics buyer, in a person's home which, unknown to that person, is about to be invaded by plainclothes arresting officers pursuant to a pre-arranged signal excuses compliance with Title 18, U. S. C., Section 3109, particularly where the undercover agent maintains his undercover role and does not initiate, commence or cooperate in the arrest.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION — FOURTH AMENDMENT

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

TITLE 18, UNITED STATES CODE, SECTION 3109

The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of a warrant.

STATEMENT OF THE CASE

Petitioners were indicted by a Grand Jury for, Count I, possession and, Count II, distribution of 140 grams of cocaine.

Petitioners moved to suppress for the use as evidence against them, both the cocaine and other paraphernalia found in the apartment of Petitioner, Antonio, in which both Petitioners were present at the time of their arrest. Testimony taken at the hearing of the Motion to Suppress revealed the following:

1. Overview of the facts prior to entry.

On July 23, 1974, a confidential informant by the name of Ronald Shulman and an undercover agent of the Drug Enforcement Administration by the name of Mario Perez entered the apartment of James Antonio for the purpose of negotiating the purchase of cocaine. They entered around 12:00 Noon. Waiting outside in the capacity of surveillance agents were four (4) other officers of the D. E. A.. Agents Sweat and Tetterton were in one car, monitoring a transmitting device being used by the confidential informant Shulman. Agents Williams and Andrejko were in another automobile maintaining direct surveillance of the front door of the Antonio apartment from a point just South of it.[1]

After Shulman and Perez were inside approximately a half-hour, Petitioner DeFeis arrived, parked his car, walked the short distance to Antonio's apartment and entered. At about 12:45 P.M., Perez "instructed" Shulman to leave the apartment in order to obtain the money for the purchase. This directive was the prearranged signal for the agents to enter the apartment.

Shulman left the apartment and met briefly with Agents Sweat and Tetterton near his car in the parking area. Meanwhile, Agents Williams and Andrejko, having been told earlier that Shulman's leaving the apartment was "going to be a signal that the cocaine was in fact in the house and . . . to proceed into the house to arrest the defendants[,]" did proceed up the walkway and stationed themselves on either side of the door to the apartment.

2. The entry.

With the Government's consent and stipulation, the defendants testified by proffer of their respective counsel. Petitioner DeFeis stated that he was seated at the dining room table in Antonio's apartment. From this position, Mr. DeFeis could observe virtually the entire Antonio apartment, with an especially clear view of the front door.

---

[1]Various photographs of Antonio's ground level apartment, and of the surrounding area, were admitted into evidence at the hearing and graphically portray the front door to the apartment where certain significant events occurred.

After Shulman left the apartment to retrieve the money, pursuant to Perez's instruction, Mr. DeFeis saw the agents enter the front door. However, their entry was *not* preceded by "any announcement." He did hear the officers say "federal agents, don't move" but only after they were "well into the living room area of the apartment; ***".

Antonio testified by stipulated proffer that when Shulman left the apartment, he left his seat at the dining room table and went into the kitchen. He asked Perez if he wanted coffee. He heard voices say "Don't move" at which time someone almost simultaneously put a .38 calibre firearm to his head and ordered him to put his hands up. He also stated that he did not actually go to, or open, the front door of his apartment, but remained in the kitchen-dining room area.

Agent Sweat testified that Petitioner Antonio, not Shulman, opened the door to the apartment. However, he acknowledged, as accurate, testimony he had given one year earlier at the preliminary hearing where he stated that Shulman knocked, "opened the door, stepped out of the way and we entered."

It appeared, then, according to Agent Sweat's testimony, given just eight days after the entry occurred, that it was Shulman, not Petitioner Antonio, who opened the door to the apartment in order to allow the agents to enter.

Sweat also stated that, prior to entering, Shulman had advised him that there were no weapons inside the apartment.

After the entry, Agent Perez continued to act out his role of "buyer." He simulated being arrested, put his hands up against a wall and even fought a little bit in order to maintain his "cover." Agents Sweat and Tetterton were the ones who seized the cocaine and other tangible evidence present in the apartment.

Agent Sweat was the third agent to enter the apartment, behind Agents Williams and Andrejko. He could not recall whether they touched the door or not in order to enter but believed it was "very possible that we touched the door."

Agent Williams, however, was quite certain that some force had to be employed in order to enter the apartment. He recalled, as earlier indicated, that when the confidential informant exited, that was their signal to proceed into the house. Williams believed that he was the first one through the door. With regard to the necessity of using force in order to enter, Williams testified that "when the door was opened, we pushed or pulled the door, whichever it was."

Williams also indicated, like Sweat, that once the door opened a bit, the agents rushed in and *then* announced who they were, to wit: "*** we did enter, announced our authority and place[d] the people under arrest, yes, sir." He repeatedly emphasized the haste with which the entry was made — "Probably with two people, one or two people going to *rush* through the door, the door would be open then by the force of the bodies." and "after we *rushed* in or while we were *rushing*, the door would have been bumped and opened further." And, again, "when the door

was open a certain degree then we were able to determine who was there and *then it was just a rush* in to place those inside under custody . . ."[2]

Of the three (3) Government agents who testified as to their activities prior to entry (Sweat, Williams and Andrejko), only Andrejko expressed certainty that Antonio had opened the door, and that it was open wide enough for everyone to enter because he could see Antonio's entire body standing in front of the door *from his position.* He also was certain that the door opened *inward,* and that the opening space was on *his side,* or "on the left side as you face the door, . . ." He was, he said, "to the left of the doorway." As the door was opened, he recalled, he was crouched low and merely moved his head over to the side in order to see Antonio "standing there full body . . . and his entire body was between the door frame and the left or the open part of the door." He also recalled that the door handle was on the side of the door he was on, to wit: the left side.

Further uncontradicted evidence revealed, however, that Andrejko's description of what he saw *was physically impossible* from the position he placed himself in to the left of the door. George Lanten, the maintenance man for the building complex in which Antonio lived, testified that he had been employed at the building since October, 1973, right up to the time of the hearing. His job was to perform all necessary repairs on the apartments. He stated that he was familiar with Antonio's apartment, that the front door opened out, as did *all* the front doors at the complex, that it had *always* opened out and that, as one faces the

[2]Williams also testified at this point that Antonio "was closest to the door so he therefore would have to probably opened the door. He agreed that his belief that Antonio opened the door was merely an "assumption" on his part.

door, the doorknob is on the *right hand side.* He emphatically stated that the doorknob on that apartment had always been on *the right hand side.*

Mr. Lanten examined defendants' Exhibit 6 and identified the door to Antonio's apartment. It was, he said, the door with the "x" on it. He reaffirmed that it was the door he earlier described as opening out, the doorknob of which was on the right hand side. He was even sufficiently familiar with the doors in the complex to note that not all the doors had doorknobs on the right hand side, but that Antonio's definitely did. He also examined and identified defendants' Exhibits 13 and 14, the former of which is a full face frontal view of the door and the latter of which is the same with the door slightly ajar, showing that the doorknob is on the right side and that the door swings out.

Mr. Lanten testified (relative to Andrejko's testimony) that if a person stands to the left of Mr. Antonio's door, as Andrejko so clearly stated he had, and the door was open, one could see "almost nothing" of the inside of the apartment, "because he's behind the door."

Perez, it will be recalled, testified that he "instructed" Shulman to leave the apartment: "Mr. Shulman didn't decide to leave the apartment. He was instructed to leave it." Perez stated that he was at the dining room table when the agents entered, and that he "simulated surprise." Nothing, he said, was said or done in the defendants' presence to indicate that officers were going to re-enter the apartment after Shulman left. He also stated that he never opened the package of cocaine after Petitioner De-

Feis returned to the apartment with it, and that he did not conduct a field test of it, as it was seized by the other agents.

Because Agent Andrejko, to a large extent, and agents, Sweat and Andrejko, to a much lesser extent, attempted to portray Antonio as the one who opened the door to the apartment and allowed the agents to enter, Petitioners' counsel moved the court to require the Government to produce for examination the not so confidential informant, Shulman. His name was known, but not his address. Counsel explained that the Government was in possession of a report prepared by Shulman which seriously contradicted the testimony of the agents which indicated that Antonio opened the door to the apartment.

Government counsel acknowledged that it had shown Petitioners' counsel the report, and that in it Shulman reported that it was he, and not Antonio, who had opened the door to the apartment—consistent with Antonio's proffered recollection and Sweat's preliminary hearing testimony.[3] The only sentence of the report to which the Government would stipulate was read into the record:

> "When I opened the door to re-enter, four other agents went past me and shouted 'federal agents, you are under arrest.' "

The Court accepted the stipulation, without agreement of defense counsel, and further sustained the Government's objection to counsel's request to produce the informant for

[3]Williams even frankly agreed (while still expressing the belief that Antonio opened the door) that Antonio "could have been in the kitchen making a cup of coffee . . . ,", which is what Antonio said he was doing.

cross-examination in order to extrapolate the facts and circumstances which occurred prior to the entry of the apartment by the agents and to make the record complete. Counsel for the Defendants also asked that the entire statement be made a part of the record as a substantive part of the defendants' presentation, and not just as impeachment material. The Court would only indicate that it has accepted the Government's stipulation.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed by this Court for the following reasons:

A. COURTS FINDINGS WERE CLEARLY ERRONEOUS AND THE FORCEFUL ENTRY INTO THE APARTMENT VIOLATED PETITIONERS' FOURTH AMENDMENT RIGHTS.

Contrary to the Court's finding, Agent Williams entered the apartment *with*, not "without", the application of force. The testimony of the only person to suggest the door was open wide enough for Williams to enter without force was (a) contrary to the physical properties of the door and (b) equivocal and uncertain, anyway, regarding whether Williams had to use some amount of force to enter.

As the trial court stated, "[t]he slightest suggestion of force accompanying a ruse would vitiate the entry." *United States v. Beale*, 445 F.2d 977 (5th Cir. 1971); *United States v. Seelig*, 498 F.2d 101, (5th Cir. 1974). Williams testimony was more than a "slight suggestion".

It was that of the one person whom all agreed was the first to enter; who, in fact, was on the right side of the door; who candidly and explicitly stated that in order to enter it was, in fact, "necessary" to apply the use of some force, and who said that it was necessary to use the "force of their bodies" in order to get in.

It is undoubtedly true that "[t]he findings of a district court as well as an Appellate Court on a pre-trial motion to suppress are binding upon the court unless they are clearly erroneous. * * * *"United States v. Reynolds*, 511 F.2d 603, 607, (5th Cir. 1975); *United States v. Gunn*, 428 F.2d 1057, 1060 (5th Cir. 1970); 3 Wright, *Federal Practice and Procedure*, Section 675, at 130 and Section 678 at 143, n. 43. However, the findings of a court are clearly erroneous, " 'when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.' " *Clayton v. United States*, 302 F.2d 30, 35 (8th Cir. 1962), quoting from *United States v. United States Gypsum Co.*, 333 U.S. 364, at 395, 68 S.Ct. 525, at 542 (1948); see also, *Maxwell v. United States*, 277 F.2d 481 510 (6th Cir. 1960); and *Jackson v. United States*, 353 F.2d 862 (D.C. Cir. 1965).

The *Jackson* case is, perhaps, the best example of both the recognition of the "clearly erroneous" standard and the application of its definition in a factual setting which required reversal. Two police officers had testified that, while patrolling in a slum area, a reliable informant, who was herself an addict and prostitute, approached them and related that there was "a Negro male, five foot nine, 25 to 27 years, wearing a brown cap, a tan zipper waist-length jacket, green corduroy trousers, dark complexion,"

in the Franklin Delicatessen with heroin in his possession. 353 F.2d at 864. Thereupon, the officers entered the store, found Jackson and another Negro male, and asked both to step outside. Once outside, however, they searched Jackson's companion first and then, finding nothing on him, proceeded to search Jackson.

The Court agreed that the information which the officers said they received was sufficiently detailed but, because of the considerations noted by the court upon evaluating both officers accounts, it rejected as clearly erroneous the District Court's assumption that the officers in fact ever received such detailed information. *Id.*, at 864.

Citing what it called the "classic formulation" of the "clearly erroneous" test laid down in *Gypsum*, (supra), the court observed that "the rule [may] appl[y] whether or not there were conflicts in testimony which the lower court resolved." 353 F.2d, at 865.

The Court agreed that to the extent that the credibility of the police officers hinged on demeanor, it would defer to the District Judge. "But," the court said, "that the officers seemed to be telling the truth does not end the matter." *Id.*, at 866.

> "A number of other factors often considered in judging credibility, must be examined, such as whether the witness was interested in the outcome, his reputation, *his degree of recall, the internal inconsistencies in his testimony, and the likelihood of his story.*" *Ibid.*

"Sometimes," the court added, "it is possible to disprove testimony *as a matter of logic by the uncontradicted facts* or by scientific evidence." *Id.*, at 867. The court examined many of the above elements in evaluating the officers' testimony, and concluded that it had the "definite and firm conviction, that if the officers had the detailed description of the suspect they claimed to have, they would have arrested but one man." *Id.*, at 868.[5]

Apropos to the case at bar, the court found that "[i]n rejecting under the clearly erroneous test the trial court's finding that the officers had the description they claimed, we need not reject any of the trial court's other findings." *Ibid.* It further emphasized that it was "not necessarily finding the officers' testimony untrue." "[B]ut," the court said, "*we cannot give it effect against what [they themselves] did, and did not do, without disregarding the ordinary laws that govern human conduct.*" *Ibid.*

In the instant case, "the ordinary laws" of physics which governed how the door on Antonio's apartment opened, when measured against the physical position in which Andrejko placed himself with such certainty, requires that what he says he saw not be given effect—not necessarily because it's untrue as the court said in *Jackson*, but because it cannot be given effect without disregarding logic, the uncontradicted facts of this case and "the ordinary laws that govern [such a door's] conduct."

[5]The Court was greatly bothered by ". . . the uncontradicted testimony . . . that the officers did not behave as we would expect officers with such a detailed description of the suspect to behave. They arrested both Jackson and the other man in the delicatessen, and searched the other man first. * * * . . . the admission of these officers to one illegal search tends to prove they were involved in mere investigative arrests . . . ." 353 F.2d, at 868.

Without realizing which way the door opened, and on which side it opened, Andrejko unwittingly placed himself "behind the door" in such a position that it would have been virtually impossible for him to have seen anything except a close view of the door's wood grain.

The District Court did implicitly accept as true the fact that the agents had failed to announce their authority until after they were inside, to wit: "*once inside*, their authority was announced; * * *". (R. 299) Accordingly, the court having clearly erred with respect to its finding that Agent Williams entered the apartment without force (when he, himself, clearly stated that he had), combined with the absence of any prior announcement of authority before entering, as mandated by 18 U.S.C., Section 3109, requires that the affirmance by the Appellate Court be set aside.

Two final observations seem worth noting at this juncture. First, even if the door had been opened wide enough for a man to have entered, as Andrejko postulated, Andrejko's own admission that he was not certain whether Williams had to "brush by the door or not," in company with Williams' sure declaration that it was, indeed, "necessary" for him to push or pull the door in order to enter, leads compellingly, by a preponderance of the evidence (when fairly reconciled), to the conclusion that some force was used to enter. *Lego v. Twomey*, 404 U.S. 477, 92 S.Ct. 619 (1972).

However, there is a second, and more practical observation, which requires some poignant consideration. The Fifth Circuit in *Beale, supra*, at 978, held that it was convinced that *Sabbath v. United States*, 391 U.S. 585, 88 S.Ct. 1755, 20 L.Ed.2d 828 (1968), "left undisturbed the

existent distinction between entry where some force is employed and entry where force is *not an element at all.*" Ibid. The Court made it quite plain that its decision hung on "entry by deception *and wholly without application of force . . .*" *Ibid.*

Assuming, for the sake of argument, that Antonio had opened the door wide enough for Williams to have entered, without having to further push the door open in order to enter, the scene at Antonio's front door described by Williams, Sweat, Andrejko, and even the informant (per the stipulated testimony accepted by the court below) depicted four (4) plainclothes, undercover agents literally rushing headlong and full body, with pistols drawn, into Antonio and into his home with a great sweep of force.

This was not a peaceful entry by ruse or deception; it was a tactical, timed, pre-arranged invasion or assault upon the entrance to Antonio's apartment dwelling with all the force and feasomeness that four armed and dangerous men could muster.

The Fifth Circuit used some pretty explicit language in *Beale, supra*, when it said, as quoted above, "where force is not an element *at all*" and "*wholly* without application of force." Somehow, we all have become somewhat sidetracked, it seems upon reflection, on dissecting whether the door was touched by Williams, or just breathed upon, when, regardless, there was "force" used in order to enter. Forceful assault on privacy is supposed to be the main concern here, and, as such, it really does seem that a person's privacy is no less forcefully assaulted if a band of marauding outlaws comes stampeding through one's front

door, than if a band of plainclothes D. E. A. Agents, with firearms drawn and pointed, come barrelling on through after the door is opened in response to an otherwise innocuous knock.

B. THE FAILURE TO COMPLY WITH TITLE 18, U.S.C., §3109.

Section 3109[6] was designed not only to protect and maintain the privacy and dignity of a person's home, which has always been revered by the legal heritage of this country, *Miller v. United States*, 357 U.S. 301, 313, 78 S.Ct. 1190, 1198 (1958), but its purpose was also "to safeguard officers, who might be mistaken, upon an unannounced intrusion into a home, for someone with no right to be there." *Sabbath v. United States*, 391 U.S. 585, 589, 88 S.Ct. 1755, 1758 (1968). Although law enforcement officers might scoff at defendant's reliance upon the Supreme Court's concern for their safety, nevertheless needless gunfire could well have resulted in the instant case as a result of the plainclothes officers' unannounced entry.

The only rationale behind the distinction drawn between "ruse" entries and those requiring "force" is that in the ruse entry, generally, the officers are more or less invited inside, albeit under a false pretense. In this manner, entry is for the most part peaceful and there is not the danger which normally accompanies the forceful entry. In

[6] 18 U.S.C. §3109:

"The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant."

general, it may even be said that any entry which is not peaceful and orderly would require compliance with Section 3109. "Ruse," if it is to have any distinction at all from "force," must mean an invited entry, prior to which "knock and announce" would be foolish since the officer is being invited in.

The fact that an undercover agent is already inside a person's premises would only be significant if that agent declared his true identity and either arrested the occupants or opened the door and allowed other officers to enter. Only under those circumstances may it fairly be said that the Government has established its presence. Once established, the salutary purposes behind "knock and announce" no longer adhere since the agent will have already announced the presence of the Government. In fact, the very same announcement required in the ordinary case prior to entry must still be made by the agent inside if he is to avoid the occupants thinking, for example, that they are being "ripped off" (in accordance with the current idiom in the narcotics trade).

But if the agent inside merely continues to pose as a buyer, entry without announcement of authority is still going to provoke the problems which the Supreme Court said §3109 was designed to combat, to wit: sudden loss of privacy as well as the creation of a hazard to the entering officers' well being (amongst others).

There is nothing in *Sabbath, supra, Beale, supra,* or *Seelig, supra,* which remotely justifies a rule that so long as an agent is already inside premises, even if he is maintaining his "cover," entry can be forceful and unaccom-

panied by announcement of authority when the occupants have no idea at all that they are coming in or who they are.

The test in each case really should be whether the re-entry was effected peaceably by the re-entering agent who is ostensibly still using his ruse, after which he may declare who he is and appear with the other officers as back-ups to arrest everyone. But if the agent goes out as a buyer, and is *preceded* back into the premises by an armed contingent of plainclothes officers, as basically occurred in the case *sub judice*, then the problems which §3109 was designed to eliminate still appertain.

So long as the agent is either expressly or impliedly invited inside and, thereafter, leaves and re-enters under peaceable conditions, so as to minimize the danger of overreaction, the beneficial purposes of §3109 are fulfilled; otherwise, they are not, and compliance with §3109 is necessary to maximize privacy and safeguard lives.

A case on virtually "all fours" is *State v. Dugger*, Wash. App. 1974, 528 F.2d 274. In *Dugger*, an undercover agent's continued presence at a "crapgame" past a pre-set hour signalled the moment of entry for surveilling officers. They entered without announcing their purpose or authority. *Prior* to their entry, the undercover agent did *not* "change hats." Reciting the purposes behind "knock and announce," the Court *rejected* the State's argument that since the undercover agent *could have* legally seized the evidence and arrested everyone, the illegality of the other officers' entry should not be relevant:

> "'(1) it reduces the potential for violence to both the police officers and the occupants of the

> house into which entry is sought; (2) it guards against the needless destruction of private property; and (3) it symbolizes the respect for individual privacy summarized in the adage that 'a man's house is his castle.' See Miller v. United States, 1958, * * *.'" *Id.*, at 276.

The Court sought to give credence to the very same considerations noted by the Supreme Court in *Sabbath.*

Believing in the importance of these factors, the Court held as follows:

> "None of these purposes is likely to be obviated by the mere presence of an undercover officer whose authority to arrest is unknown to a lawful occupier of premises. *Without the prior warning of a knock and announcement, an officer's presence in no way minimizes the shock of the sudden intrusion with its reflexive tendency to trigger violence.* Nor will the needless destruction of private property be avoided unless an opportunity is presented to permit peaceful entry. * * *" *Id.*, at 276.

The Court further found that "[e]ven assuming that an occupant's expectations of privacy could be unknowingly waived by the presence of an undercover officer, this cannot realistically be construed as a waiver of expectations of privacy as to a " 'class of persons [to wit: the D.E.A.] whose very existence is unknown to the occupant.'" The Court recognized that the case would be significantly dif-

ferent "if the undercover officer had announced his identity and attempted to effectuate an arrest or seize evidence before his fellow officers entered . . . ." *Id.*, at 277.

Contrary to the Court's opinion below, the essence of the holding in *Dugger*, as quoted above, rested on the Court's finding that the *Sabbath-Miller* considerations, which lie historically behind §3109, could not be satisfied by excusing compliance with the Section where agents employ force to enter, and the inside agent does not shuck his cover in order to precipitate their entry. Nor did *Dugger* impliedly "negate[ ] the validity of an entry by ruse, * * *."

CONCLUSION

For the reason set forth in this Petition and based upon the cases cited therein, the Petition for Certiorari should be granted and the Judgment of the Court of Appeals reversed.

Respectfully submitted,

LAWRENCE S. KATZ,
ESQUIRE
One Lincoln Road Building
Suite 219
Miami Beach, Florida 33139
Attorney for Petitioner Antonio

GEORGE D. GOLD, and
MORAN AND GOLD, P.A.
Suite 608, Concord Building
66 West Flagler Street
Miami, Florida 33130
Attorneys for Petitioner DeFeis

CERTIFICATE OF SERVICE

I, LAWRENCE S. KATZ, Attorney for JAMES ANTONIO, Petitioner herein, and I, GEORGE D. GOLD, one of the Attorneys for GEORGE DeFEIS, Petitioner herein, each being members of the Bar of the Supreme Court of the United States, do hereby certify that on the 11th day of June, 1976, I mailed copies of the foregoing Petition for Writ of Certiorari, including Appendix, on the several parties thereto as follows:

1. On the United States by depositing a copy of same addressed to the Honorable Kerry J. Mahoom, Assistant United States Attorney, Ainsley Building, 14 N.E. First Avenue, Miami, Florida, in the United States mail with sufficient postage prepaid.

2. On the Solicitor General of the United States by depositing a copy of same addressed to him at the United States Department of Justice, Washington, D.C. 20530, in the United States mail with sufficient postage prepaid.

LAWRENCE S. KATZ,
ESQUIRE
Attorney for Petitioner Antonio

GEORGE D. GOLD, ESQUIRE
Attorney for Petitioner DeFeis

APPENDIX

in the

Supreme Court

of the

United States

_____ Term, 1976

NO. _____

JAMES ANTONIO and GEORGE DeFEIS,
Petitioners,

vs.

UNITED STATES OF AMERICA
Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

LAWRENCE S. KATZ, ESQUIRE
One Lincoln Road Building
Suite 219
Miami Beach, Florida 33139
Attorney for Petitioner Antonio

GEORGE D. GOLD, and
MORAN AND GOLD, P.A.
Suite 608, Concord Building
66 West Flagler Street
Miami, Florida 33130
Attorneys for Petitioner DeFeis

APPENDIX "A"

United States Court of Appeals,
Fifth Circuit.

No. 75-3745
Summary Calendar.*

UNITED STATES of America,
Plaintiff-Appellee,

v.

George DeFEIS and James Antonio,
Defendants-Appellants.

April 15, 1976.

Defendants were convicted before the United States District Court for the Southern District of Florida, Norman C. Roettger, Jr., J., of possession with intent to distribute and distributing cocaine, and they appealed. The Court of Appeals held that record supported ruling that entry into one defendant's apartment was accomplished without application of any force by government agents, and that entry obtained without force by ruse or deception did not violate statute which provides that, after notice of authority and purpose and refusal of admittance, officer may break open door or windows in execution of search.

Affirmed.

---

*Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Company of New York et al., 5 Cir., 1970, 431 F.2d 409, Part I.

1. Criminal Law—394.6(4)

Record in prosecution for possession with intent to distribute and distributing cocaine supported ruling that entry into one defendant's apartment, which occurred when confidential informant, who had left apartment on pretext of obtaining purchase money, returned with drug surveillance team who rushed through opening when defendant opened door sufficiently wide for entry of one man, was accomplished without application of any force by government agents. 18 U.S.C.A. § 3109.

2. Searches and Seizures—3.8(1)

Entry obtained without force by ruse or deception does not violate statute which provides that, after notice of authority and purpose and refusal of admittance, officer may break open doors or windows in execution of search warrant. 18 U.S.C.A. § 3109.

3. Arrest—68, 71.1(7)

Facts that undercover agent, who was posing as narcotics buyer and who maintained his undercover role and did not initiate, commence or cooperate in arrest, was in apartment and that warrantless entry of drug surveillance team was accomplished by ruse did not vitiate defendants' arrests and seizure of cocaine under statute which provides that, after notice of authority and purpose and refusal of admittance, officers may break open doors or windows in order to execute search. 18 U.S.C.A. § 3109.

Appeal from the United States District Court for the Southern District of Florida.

Before AINSWORTH, CLARK and RONEY, Circuit Judges.

PER CURIAM:

George DeFeis and James Antonio appeal from their convictions of possessing with intent to distribute and distributing 140 grams of cocaine, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. They contend on appeal that the trial court erred in determining (1) that the entry by Drug Enforcement Agents into the apartment from which the cocaine was seized was unaccompanied by force, and (2) that 18 U.S.C. § 3109 (pertaining to the breaking of doors or windows of a house in the execution of a search warrant)[1] was not violated by the subterfuge of government agents in gaining entry. We affirm.

A motion to suppress was heard and denied, after which appellants waived trial by jury and stipulated that the matter be decided on the evidence presented at the hearing on the motion to suppress.

Undercover DEA Agent Perez and a confidential informant went to the apartment of appellant Antonio to negotiate for the purchase of cocaine and were voluntarily

---

[1] 18 U.S.C. §3109 provides:

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

There was no warrant in this case; however, section 3109 is applicable to warrantless searches. Miller v. United States, 357 U.S. 301, 78 S.Ct. 1190, 2 L.Ed.2d 1332 (1958); Sabbath v. United States, 391 U.S. 585, 88 S.Ct. 1755, 20 L.Ed.2d 828 (1968).

admitted. A half hour later appellant DeFeis arrived at the apartment. Outside, a team of four DEA agents were on surveillance duty. After a short period of time the confidential informant, at the direction of Agent Perez, left the apartment on the pretext of obtaining necessary purchase money for the cocaine. This was a pre-arranged signal to inform the other agents that the cocaine had arrived, the transaction was in progress and that they were to enter. The confidential informant, accompanied by the surveillance team, then returned to the apartment and knocked on the door. Appellant Antonio opened the door sufficiently wide for the entry of one man, at which time the agents rushed through the opening and entered the premises. Once inside, the agents announced their authority. They arrested appellants, feigned an arrest of undercover Agent Perez, and seized the cocaine and related paraphernalia.

[1] The trial court held, in denying the motion to suppress, that the entry was accomplished without the application of any force by government officials. This ruling is amply supported by the record, and we find no error.

[2, 3] Appellants further contend that the presence of an undercover agent posing as a narcotics buyer in an individual's home, which is about to be "invaded" by plainclothes arresting officers pursuant to a prearranged signal, does not excuse compliance with 18 U.S.C. § 3109, particularly where that agent maintains his undercover role and does not initiate, commence or cooperate in the arrest. In short, they contend that the ruse vitiates the arrest and seizure. We do not agree. An entry obtained without force by ruse or deception is not a violation of

section 3109. See United States v. Beale, 5 Cir., 1971, 445 F.2d 977; Smith v. United States, 5 Cir., 1966, 357 F.2d 486. Sabbath v. United States, 391 U.S. 585, 88 S.Ct. 1755, 20 L.Ed.2d 828 (1968) is not to the contrary.[2]

AFFIRMED.

[2]See n. 7, 391 U.S. at 590, 88 S.Ct. at 1758, 20 L.Ed.2d at 831.

APPENDIX "B"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-3745

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

GEORGE DeFEIS and JAMES ANTONIO,
Defendants-Appellants.

Appeals from the United States District Court for the
Southern District of Florida

[FILED MAY 13, 1976]

ON PETITION FOR REHEARING
(MAY 13, 1976)

Before AINSWORTH, CLARK and RONEY,
Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed on behalf of George DeFeis in the above entitled and numbered cause be and the same is hereby denied.

No. 75-1804

In the Supreme Court of the United States

OCTOBER TERM, 1976

GEORGE DEFEIS and JAMES ANTONIO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

JEROME M. FEIT,
FREDERICK EISENBUD,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1804

GEORGE DEFEIS and JAMES ANTONIO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 530 F. 2d 14.

JURISDICTION

The judgment of the court of appeals was entered on April 15, 1976. A petition for rehearing was denied on May 13, 1976 (Pet. App. B). The petition for a writ of certiorari was filed on June 11, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether federal agents' mode of entry into an apartment violated 18 U.S.C. 3109, and whether, even if it did, suppression of the evidence seized therein was appropriate in light of the lawful presence of an undercover agent already in the apartment.

STATEMENT

Following a suppression hearing in the United States District Court for the Southern District of Florida, petitioners were tried by the court (upon the evidence and testimony adduced at the hearing) and were each convicted on two counts of possessing and distributing cocaine, in violation of 21 U.S.C. 841(a)(1). Petitioner Antonio was sentenced to concurrent terms of six years' imprisonment on each count. Petitioner DeFeis has been released on bond and has not yet been sentenced. The court of appeals affirmed (Pet. App. A).

At approximately noon on July 23, 1974, Ronald Shulman, a government informant, and Mario Perez, an undercover agent for the Drug Enforcement Administration ("DEA"), entered petitioner Antonio's apartment with the latter's consent to negotiate the purchase of cocaine (Tr. 8-9, 184-185). Four other DEA officers were nearby. Two of them were monitoring a transmitting device being used by Shulman (Tr. 44-45, 64, 92).

Petitioner DeFeis arrived at the apartment at approximately 12:30 p.m. (Tr. 97). Antonio placed a quantity of cocaine on a table in the living room and assured Agent Perez of its high quality. Antonio also indicated that he had access to large quantities of cocaine and that future sales were possible (Tr. 184-186). Perez then told Shulman to go to his (Shulman's) car for the purchase money (Tr. 44, 188).

The order to Shulman to get the money was a signal to the agents that a drug transaction was occurring and that they should enter the apartment (Tr. 44). Once outside, Shulman met the agents and affirmed that the transaction was in progress (Tr. 44-45).

The testimony concerning the agents' entry into the apartment was conflicting. Three agents testified that

they approached the apartment door with Shulman, who knocked, that petitioner Antonio opened the door from within, and that the agents rushed through the open door with their guns drawn (Tr. 17-20, 28, 46, 66-67, 70, 77, 79-80, 101-103, 107-109).[1] Agent Williams, the first person to enter the apartment, said that it was necessary either to push or to pull the door somewhat, and that he assumed the door was bumped as the agents went by (Tr. 67, 79-80). As they entered the apartment, Williams announced their authority as federal agents and quickly placed the occupants—Antonio, DeFeis, and Perez—under arrest (Tr. 27, 50, 66, 149). Agent Perez continued his undercover role. His .45 caliber automatic was seized and he feigned a struggle with the agents (Tr. 33, 41, 72). Five ounces of cocaine and related narcotics paraphernalia were seized from the table in the living room, where the informant had said it would be (Tr. 29, 32, 47).

Petitioners, by agreement with the government, proferred testimony through their counsel. Antonio said that he was in the kitchen when the agents entered. Both denied hearing any knock and stated that the agents did not announce themselves until after they entered the apartment (Tr. 207-209).[2] A written statement by the informant, Shulman, to the effect that he had opened the door, was also introduced[3] (Tr. 163), as was a similar statement

---

[1]One of the agents could not recall which way the door opened (Tr. 67). Two others stated their belief that the door opened inward and from the left side (Tr. 27, 103, 109), although it was later established that the door opened out and that the knob was on the right side (Tr. 199).

[2]Agent Perez testified that he heard a knock on the door and saw Antonio move in the direction of the door. He did not see who opened the door, however, since he was keeping watch on DeFeis (Tr. 146-149).

[3]Contrary to petitioners' contention that the government would stipulate only to one sentence of the statement (Pet. 10, 11), the government agreed "that if the informant were called to testify he would testify as to what is in that statement" (Tr. 159, 160).

made by Agent Sweat at a preliminary hearing shortly after petitioners were arrested (Tr. 20).[4]

ARGUMENT

Petitioners argue that the agents' entry into the apartment violated 18 U.S.C. 3109 and that the narcotics and other evidence seized in the apartment must therefore be suppressed. We submit, however, that the entry did not offend Section 3109 because no force of the sort condemned by that statute was used and because exigent circumstances were present in any event, and that Agent Perez's presence in the apartment and his constructive possession of the narcotics rendered the other agents' mode of entry, even if unlawful, irrelevant to the admissibility of the evidence.

1. Section 3109 provides:

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

Although the officers in this case were not acting pursuant to warrant, Section 3109 has been held to govern warrantless searches as well (*Miller* v. *United States*, 357 U.S. 301; *Sabbath* v. *United States*, 391 U.S. 585), and thus the statute applies here.

---

[4]At the suppression hearing, Agent Sweat stated that he believed the door was opened by someone from within (Tr. 27). He was not, however, in the best position to observe, since three or four other agents preceded him into the apartment (Tr. 25). Agent Williams, who was standing immediately to the right of the door and was the first agent to enter the apartment, was certain that the informant did not open the door (Tr. 81-82).

While Section 3109 speaks of "breaking open" doors or windows, its implied prohibition has been construed to reach entries gained by use of force considerably less violent than that phrase connotes. Thus *Sabbath*, *supra*, held unlawful the unannounced opening of an unlocked door. Yet some minimal amount of force, in the sense of physical action by the officers to remove the barrier to entry must still be found to have been exerted before the statute's protection may be claimed. *United States* v. *Beale*, 445 F. 2d 977 (C.A. 5).

Almost all of the courts of appeals that have faced the issue have held that that minimal amount of force is lacking in cases where, as here, the officers enter through an open door. See, *e.g.*, *United States* v. *Morell*, 524 F. 2d 550, 556 (C.A. 2); *United States* v. *Lopez*, 475 F. 2d 537, 540-541 (C.A. 7); *United States* v. *Johns*, 466 F. 2d 1364 (C.A. 5); *United States* v. *Conti*, 361 F. 2d 153 (C.A. 2), vacated on other grounds, 390 U.S. 204; *United States* v. *Williams*, 351 F. 2d 475 (C.A. 6); *United States* v. *Hassell*, 336 F. 2d 684 (C.A. 6), certiorari denied, 380 U.S. 965.[5] The common rationale behind these decisions is that an entry through an open door is not the sort of violent or potentially dangerous act that the statute

---

[5]The District of Columbia Circuit, alone among the federal courts, has held that officers must announce their authority and purpose before entering through an open door. *Hair* v. *United States*, 289 F. 2d 894. This case appears to be inconsistent with the language of Section 3109 and unsupported by the rationales for such a rule. See generally Note, *Announcement in Police Entries*, 80 Yale L. J. 139 (1970), and Blakey, *The Rule of Announcement and Unlawful Entry: Miller v. United States and Ker v. California*, 112 U. Pa. L. Rev. 499 (1964). In any event, the present case presents an inappropriate vehicle for resolution of the long-standing conflict created by *Hair*, given the alternative bases for upholding the judgment below (see text, *infra*).

forbids. And it does not matter whether the door is completely or only partially open when the officers enter. See *Jones* v. *United States*, 336 A. 2d 535, 538 (D.C. Ct. App.), certiorari denied, 423 U.S. 997 (no announcement needed for officers to push open door partially opened by occupants); *United States* v. *Syler*, 430 F. 2d 68, 70 (C.A. 7) (same). Thus, even if, in passing through the already open door, the agents brushed against it or otherwise widened the space initially presented them, they did not use force to "break open" the door within the meaning of Section 3109, and accordingly the courts below were correct in ruling that the statute was not violated in this case.[6]

Moreover, this Court has acknowledged, in both *Miller* (357 U.S. at 309) and *Sabbath* (391 U.S. at 591), that there may be an "exigent circumstances" exception to the requirements of Section 3109. In this case the agents knew that a narcotics transaction was in progress at the time they entered the apartment and that an undercover agent was in the apartment with the suspects. Announcement of their identity and purpose might have jeopardized both the recovery of the evidence and the safety of the other agent. Even though the lower courts did not rely upon this rationale, the exigency of these circumstances provides another basis for upholding the decision below.

2. Even if the agents' mode of entry did violate Section 3109, admission of the evidence was nonetheless proper

---

[6]The courts below do not appear to have resolved the controversy regarding whether petitioner Antonio or the informant Shulman opened the door. In either case the agents themselves did not. Even if it was Shulman rather than Antonio who opened the door, Section 3109 was not violated, given that Shulman had already been accepted into petitioners' midst and presumably need not have stood upon the formality of knocking and waiting for one of them to open the door before opening it himself.

in light of Agent Perez's lawful presence in the apartment at the time of the entry. Agent Perez's entry did not offend Section 3109, since "entries obtained by ruse * * * have been viewed as involving no 'breaking' " (*Sabbath*, *supra*, 391 U.S. at 590 n. 7). Unlike the informant in *Sabbath*, Perez was a full-time narcotics agent authorized to make arrests and seize evidence, and he was "under a duty to guard the contraband, which he did, and to take actual possession if necessary." *United States* v. *Glassel*, 488 F. 2d 143, 146 (C.A. 9), certiorari denied, 416 U.S. 941. The cocaine that petitioners placed on the living room table was in plain view (*Coolidge* v. *New Hampshire*, 403 U.S. 443), and Agent Perez may be said to have constructively possessed it at the time the other agents entered. In these circumstances the causal connection between seizure of the evidence and the other agents' entry, even if that entry was technically unlawful under Section 3109, was too attenuated to warrant suppression. *United States* v. *Glassel*, *supra*; see *United States* v. *Bradley*, 455 F. 2d 1181, 1186 (C.A. 1), affirmed on other grounds, 410 U.S. 605.[7]

---

[7]*State* v. *Dugger*, 528 P. 2d 274 (Wash. App.), decided under a state "knock and announce" rule similar to Section 3109 and relied on by petitioners (Pet. 19-21), is to the contrary. That case is unpersuasive, however, and should carry little weight in the federal courts. The court there held that an undercover agent present at an unlawful dice game when other agents broke into the house should have "announced his identity and attempted to effect an arrest or seize evidence before his fellow officers entered" (*id.* at 277). Such a requirement would mean that undercover agents would have to reveal and discard their role whether or not its usefulness had come to an end, and that, in some cases, the agents would have to expose themselves to danger at the hands of the suspects without the aid of their fellow agents.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

JEROME M. FEIT,
FREDERICK EISENBUD,
Attorneys.

SEPTEMBER 1976.

DOJ-1976-09